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IN THE HIGH COURT OF JUDICATURE AT MUMBAI

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 9266 OF 2014

Gurudev Singh Mann and others ... Petitioners

Vs.

1. Shatrughan Sinha

2. Municipal Corporation of Greater Mumbai ... Respondents

Ms.Uma Wagle, Advocate for Petitioners.

Dr.Abhinav Chandrachud a/w Ms.Prachi Sawant i/b M.V.Kini & Co.,
Advocate for Respondent No.1.

CORAM : R.G.KETKAR, J.

DATE : 14th JANUARY, 2016

P.C. :

. Heard Ms.Uma Wagle, learned Counsel for the petitioners and Dr. Abhinav Chandrachud, learned Counsel for the respondent No.1 at length.

2. Ms.Wagle orally applies for deleting respondent No.2 on the ground that respondent No.2 has not even filed written statement in the trial Court. On the motion made by Ms.Wagle, respondent No.2 is deleted from the present proceeding. Rule. Dr. Chandrachud waives service. At the request and by consent of the parties, rule is made returnable forthwith and the Petition is taken up for filing hearing.

3. By this Petition under Article 227 of the Constitution of India, original plaintiffs have challenged the judgment and order

dated 10/04/2014 passed by the learned Judge, City Civil Court Borivali Division, Dindoshi, Mumbai in Notice of Motion No. 2848 of 2013 in L.C. Suit No.5289 of 2004. By that order, the learned trial Judge partly allowed the Motion taken out by the petitioners, hereinafter referred to as plaintiffs only to the extent of permitting them to adduce evidence in respect of additional issue No. 1 at Exhibit 6-A.

4. Ms.Wagle submitted that plaintiffs have instituted Suit inter alia praying for perpetual injunction restraining the respondent No.1, hereinafter referred to as defendant No.1, from covering the suit passage which is shown in green colour boundary in the rough sketch at Exhibit 'A'; perpetual injunction restraining defendant No.1 from opening the suit gate which is shown in blue colour boundary in the rough sketch at Exhibit A; for mandatory direction to defendant No.1 to restore the original position of the flat on the ground floor in the premises known as Lav Kush situate at 5th Gulmohar Cross Road, Plot No. 17, J.V.P.D. Scheme, Juhu Mumbai - 400 049 by closing the suit entrances and reconstructing the walls, which were demolished and by removing the steps which defendant No.1 has already constructed in the suit passage from one of the suit entrances; for direction to the Corporation (defendant No.2) to initiate appropriate action against defendant No.1 for construction carried out by him in and outside the flat on the ground floor; for

setting aside the order of regularization dated 21/04/2005 passed by defendant No.2 – Corporation, among other prayers.

5. She submitted that affidavit of plaintiff No.1 in examination-in-chief was filed in 2007 and compilation of the documents on which plaintiffs rely was filed in 2009. She submitted that in cross examination in paragraph 44, PW.1 – Gurudev Singh Mann (plaintiff No.1) stated that he was not deposing for plaintiffs No. 2 to 4. On 20/06/2013, cross examination of PW.1 was over. Advocate for the plaintiff sought time to examine one more witness and matter was adjourned to 25/06/2013 for further evidence of the plaintiffs. On 25/06/2013, plaintiffs and defendants and their advocate were absent. The learned trial Court observed that “it reveals that the plaintiffs do not want to lead further evidence. Hence, their right to evidence is forfeited and adjourned for evidence of the defendants and adjourned for evidence of defendants on 10/07/2013”. On 20/07/2013, the learned trial Judge framed an additional issue as 'do plaintiffs prove that defendant No.2/Corporation has illegally regularized unauthorised work carried out by defendant No.1 and order of regularization is arbitrary, illegal and null and void?'

6. She submitted that whereas in the order dated 20/06/2013, the learned trial Judge adjourned the hearing for further evidence of plaintiffs to 25/06/2013, on the very next date

i.e. 25/06/2013, plaintiff's right to lead evidence was forfeited, more so when plaintiffs and defendant No.1 and their advocate were absent. The plaintiffs, therefore, took out Notice of Motion for leading further evidence. By the impugned order, the learned trial judge has partly allowed the Motion. In paragraph 7, the learned trial Judge has observed that it will not be proper to allow plaintiffs to adduce evidence afresh which will result in neutralizing the cross examination of P.W.1. The learned trial Judge accepted the plaintiffs request only to the limited extent as regards additional issue No. 1 framed at Exhibit 6-A. She further states that plaintiffs want to examine plaintiff No.3- Vijay Madhrani and one more witness. She further states that plaintiffs will not examine any other witness. She assures that within one week from today, she will file list of the witnesses viz. Plaintiff No.3 and one more witness and serve copy in advance on the other side.

7. On the other hand, Dr.Chandrachud supported the impugned order. He submitted that plaintiffs came with the case that P.W.1 was not in a proper state of mind when he deposed. He submitted that the plaintiffs have taken out this Motion so as to nullify the admissions given by P.W.1 during his cross examination. He has taken me through the cross examination of P.W.1 which is to the following effect :

- i) it is true that the disputed steps/stairs were already in existence at the time of filing of the Suit;
- ii) I cannot identify the disputed construction in the map shown to me;
- iii) I have only right in respect of my flat as per the agreement.

8. He submitted that if at all the Court is inclined to permit plaintiffs to lead evidence of plaintiff No.3 and one more witness on additional issue, they should be directed not to lead evidence so as to nullify these admissions.

9. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. As noted earlier, in the cross examination P.W.1 stated in paragraph 44 that he is not deposing for plaintiffs No. 2 to 4. In other words, P.W.1 could be said to be deposing on his behalf alone. On 20/06/2013, cross examination of P.W.1 was over and the matter was adjourned to 25/06/2013 for further evidence of the plaintiffs. On 25/06/2013, plaintiffs and defendant No.1 and their advocates were not present and the learned trial judge forfeited the right of plaintiffs to lead further evidence on the ground that plaintiffs did not want to lead further evidence. In my opinion, the learned trial Judge was not justified in passing these orders, more so when the learned trial Judge himself had adjourned the matter on

20/06/2013 to 25/06/2013 for leading further evidence by the plaintiffs.

10. At the same time, one has to consider whether plaintiffs are trying to wriggle out of the admission given by PW.1 during the cross examination. Perusal of cross examination of PW.1, prima facie shows that he stated that it is true that the disputed steps/stairs were already in existence at the time of filing of the Suit.

11. As far as other admissions extracted hereinabove namely that he can not identify disputed construction in the map shown to him and he has only right in respect of his flat as per agreement of sale will, prima facie, bind PW.1 and it cannot be said that it will bind other plaintiffs. In other words, plaintiff's witness will not lead evidence in respect of the statement of PW.1 to the effect that it is true that the disputed steps/stairs were already in existence at the time of filing of the Suit.

12. Understood thus, in my opinion, the plaintiffs should be allowed to examine plaintiff No.3 and one more witness whose name shall be given in the list of witnesses within one week from today and no other witness. Hence, following order.

1. The impugned order dated 25/06/2013 is set aside and the plaintiffs are permitted to examine plaintiff No.3- Vijay Madhrani and one more witness whose name shall be given within one week from today by filing list of witnesses in the trial Court and no other witness.

2. The plaintiffs will extend full co-operation for recording their evidence.

3. The plaintiff's witness shall lead evidence other than on the point that the disputed steps/stairs were already in existence at the time of filing of the Suit.

13. Rule is made absolute with no order as to costs.

(R.G.KETKAR, J.)